COURT OF APPEALS
DECISION
DATED AND RELEASED

October 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1948-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES C. BERLIN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

NETTESHEIM, J. James C. Berlin appeals from a judgment of conviction for operating a motor vehicle while under the influence of intoxicants. He raises two issues. First, he argues that the arresting officer did not have probable cause to believe that Berlin was operating his vehicle on a premises held out for public use. Second, Berlin argues that the officer did not have sufficient grounds to initially stop and detain him. He bases this argument on a stipulation of facts which he and the State entered into in the trial court.

The court, however, relieved the State from the stipulation and permitted the State to present additional facts in support of the stop and detention. Based on these additional facts, the court rejected Berlin's motion. Berlin argues that the court misused its discretion when it relieved the State from the stipulation.

We reject both of Berlin's arguments. Therefore, we affirm the judgment of conviction.

BACKGROUND

The arresting officer initially spotted Berlin's vehicle parked in the parking lot of Ralph's Steakhouse. The restaurant was closed at the time. The officer approached the vehicle, observed Berlin in the vehicle, detected the odor of intoxicants and determined that Berlin had operated the vehicle. After further investigation and observation, the officer arrested Berlin.

Berlin filed two motions challenging the officer's actions. First, Berlin challenged the arrest, contending that the officer did not have probable cause to believe that the parking lot was held out to the public at the time of the arrest. The trial court ruled that, in the absence of any signs restricting or prohibiting its use, the parking lot was held out to the public even though the business was closed.

Berlin's second motion challenged the officer's initial stop and detention of Berlin before the arrest. The State and Berlin entered into a stipulation of facts upon which they asked the trial court to decide this issue. The stipulation was as follows: Officer Libby, the arresting officer, would testify

that he investigated Berlin's vehicle because it was in the parking lot of a closed restaurant and that there had been problems in the area before. During the course of the motion hearing, the court opined that the stipulated facts did not recite sufficient justification for the stop and detention.[1] The State then indicated that there were other reasons not included in the stipulation which justified the officer's actions. The assistant district attorney indicated: "I did not think it through when we initially talked about the stipulation."

Over Berlin's objection, the trial court relieved the State from the stipulation and permitted the State to file an affidavit outlining the officer's additional reason for detaining Berlin. The affidavit stated that prior to the stop, the officer noted that Berlin's vehicle was not displaying license plates. Based on this added information, the trial court rejected Berlin's motion.

The parties then stipulated to the facts for purposes of the ensuing bench trial. The court found Berlin guilty. Berlin appeals.

DISCUSSION

Relief from Stipulation

We address the issues in reverse order from that in the trial court. We first consider whether the officer's initial approach to Berlin's vehicle and his initial stop and detention of Berlin were proper under ***Terry v. Ohio***, 392 U.S. 1 (1968).

[1] The court stated, "[If] it's just problems in the area without more, the State does not win. They lose this motion."

As noted, the parties stipulated to the facts regarding this motion. When the trial court opined that the stipulation did not support the stop and detention under ***Terry***, the court inquired whether the State had additional facts to support its claim. The assistant district attorney responded that there were additional facts and that she had not sufficiently thought through the matter when she had entered into the stipulation.

A trial court has discretion, in the interests of justice and equity, to relieve parties from stipulations when improvident or induced by fraud, misunderstanding or mistake. *See* ***Schmidt v. Schmidt***, 40 Wis.2d 649, 654, 162 N.W.2d 618, 621 (1968). To sustain a discretionary act, we need only conclude that the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Therefore, in order to reverse the decision of the trial court, this court must find either that the trial court did not exercise its discretion or that there was no reasonable basis for the trial court's conclusion. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 542, 363 N.W.2d 419, 422 (1985); ***Schmidt***, 40 Wis.2d at 654, 162 N.W.2d at 621.

The goal of any evidentiary hearing is to unearth all the relevant facts and to search for the truth. In the course of the hearing in this case, the trial court learned that the State had further relevant information which was not included in the stipulation. The court was faced with two options: (1) hold the State to the stipulation and thereby foreclose the court from hearing further

evidence which might prove important and relevant to the issue; or (2) relieve the State from the stipulation and receive the further evidence. The court chose the latter. We cannot say that the court misused its discretion, particularly where the assistant district attorney candidly admitted that she had not sufficiently thought through the implications of the stipulation. By this statement, the State was saying that it had improvidently entered into the stipulation.

We also note that Berlin's motion challenging the officer's ***Terry*** stop, while generally contending that the stop was not based upon a reasonable suspicion, specifically contended that the officer did not have a reasonable suspicion that Berlin was under the influence of an intoxicant. The trial court observed that both the State and the court had misunderstood the thrust of Berlin's motion and supporting brief. In his brief, Berlin acknowledged that he did not then know specifically why the officer approached his vehicle. However, his argument was that "unless the defendant was originally stopped because the officer believed him to be operating while intoxicated, the officer expanded the scope of the stop and detention in order to investigate whether he committed some other offense." This argument suggested that the focus of Berlin's challenge was that the officer did not have sufficient grounds to believe that Berlin was intoxicated as opposed to other grounds which excited the officer's suspicion. Thus, the assistant district attorney may not have thought that the stipulation was important to the focus of Berlin's argument as she interpreted it. Therefore, it appears that the State's stipulation may also have been prompted by a misunderstanding.

Upon our review of the record, we conclude that the trial court did not misuse its discretion in choosing to get to the bottom of the matter rather than rigidly hold the State to the stipulation.[2] To deny relief from the stipulation in this case would have defeated the truth-seeking function of the fact-finding proceeding in the trial court. Therefore, the court did not erroneously exercise its discretion when it relieved the State from the stipulation.

Berlin also sought to suppress evidence on the grounds that the arresting officer did not have probable cause to believe that the parking lot in which Berlin was located was "held out to the public" within the meaning of § 346.61, STATS. In reviewing an order suppressing evidence, this court will uphold a trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Richardson***, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether a seizure or search has occurred, and, if so, whether it passes statutory and constitutional muster are questions of law subject to de novo review. ***Id***. at 137-38, 456 N.W.2d at 833.

This motion was not governed by the parties' stipulation regarding the prior issue. Nonetheless, the facts, while murky, are undisputed. Thus, the question narrows to whether those facts pass the legal test for

[2] We also note an ironic twist to this issue. Before ruling on this motion, the trial court had already rejected Berlin's motion contending that the arrest was invalid because the parking lot was not held out to the public. The evidence presented to the trial court on that issue included the arresting officer's report which recited that he approached Berlin's vehicle *because it was not displaying license plates.* Thus, the very evidence which the State provided by way of supplemental affidavit on the ***Terry v. Ohio***, 392 U.S. 1 (1968), issue was already before the court on the prior issue.

probable cause. Probable cause requires that the police officer have facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant has committed or is in the process of committing an offense. ***Id.*** at 148, 456 N.W.2d at 838. In this case, the precise question is whether the arresting officer had probable cause to believe that the parking lot was held open to the public.

The operation of a motor vehicle while under the influence of intoxicants is illegal if it takes place upon a public highway or "upon ... premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned …." Section 346.61, STATS. In ***City of Kenosha v. Phillips***, 142 Wis.2d 549, 419 N.W.2d 236 (1988), the supreme court considered whether a parking lot was "held out to the public" for the purposes of § 346.61. The court held that there must be "proof that it was the intent of the owner to allow the premises to be used by the public." ***Phillips***, 142 Wis.2d at 554, 419 N.W.2d at 238. The burden to present this proof is on the prosecution. ***Id.*** at 558, 419 N.W.2d at 239. However, this burden can be satisfied by any of the conventional forms of proof—direct, demonstrative, testimonial, circumstantial or judicial notice. ***Id***. The proof can consist of action or inaction. ***Id***.

The factual record upon which the trial court ruled on this motion was compiled in a helter-skelter fashion which has made our review very difficult. As noted, the parties' stipulation on the prior issue did not extend to this issue. No formal testimony was taken. Instead, it appears that the parties

allowed the trial court to rule on the basis of the police reports and the allegations in the criminal complaint, even though some of this information was not known to the arresting officer at the time he encountered Berlin.[3] In addition, the parties' arguments, both in the trial court and on appeal, address whether the State has met its burden of proof assigned under ***Phillips***. We question whether that approach is proper since ***Phillips*** (and the later case of ***City of LaCrosse v. Richling***, 178 Wis.2d 856, 505 N.W.2d 448 (Ct. App. 1993)) dealt with the burden of proof assigned to the State at trial—not whether probable cause existed to support the arrest. Nonetheless, we will conduct our review on the basis which the parties brought the issue to the trial court—not on the basis on which we think the issue ought to have been addressed.

Viewed in this light, we hold that the State did meet its burden since the factual basis of the criminal complaint includes the statement of the owner of the parking lot that there were no signs posted in the lot which restricted or prohibited parking when the premises were closed. The absence of such signs or posting satisfied the burden of proof assigned to the State under ***Phillips***. Given the manner in which the parties proffered the issue to the trial court, we affirm on this basis.

Alternatively, even if we confine our review to the facts known to the arresting officer, we affirm. Probable cause is a flexible, common-sense

[3] After the trial court ruled, it inquired whether the facts it had relied on were the proper facts. Both parties answered in the affirmative and Berlin's attorney asked that the criminal complaint as well as the briefs be considered as part of the court's decision. Later, however, Berlin's counsel said that she did not want to be bound by all of the criminal complaint. In the face of such an equivocal record, we review the court's ruling on the basis of the information which the court considered.

standard which merely requires that the facts available to the officer would warrant a person of reasonable caution to conclude that an offense has been committed. *See* ***State v. Tompkins***, 144 Wis.2d 116, 124, 423 N.W.2d 823, 826 (1988). Probable cause deals not with hard certainties, but with probabilities. ***Id***. Thus, facts constituting probable cause in support of guilt can also allow for a reasonable competing inference in support of innocence. *Cf.* ***id***.

Here, when he arrested Berlin, the arresting officer did not know whether the owner of the parking lot permitted use of the lot when the business was closed. However, absent information or observations to the contrary, a reasonable police officer could fairly infer that such premises are not off limits to the public even though the business is closed. Later events might prove the officer's belief wrong, but that does not undo the arrest. On this further ground, we affirm the trial court's ruling rejecting Berlin's motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.